

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

OUR LADY OF CONSOLATION  
GERIATRIC CARE CENTER

Employer

and

Case No. 29-RC-9630

NEW YORK'S HEALTH AND  
AND HUMAN SERVICES UNION,  
1199/SEIU, AFL-CIO

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Emily Cabrera, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned:

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

At the close of the record herein, the Hearing Officer concluded that submission of briefs was not warranted as no issues remained outstanding. Earlier in the proceeding, the parties had reduced the matters in dispute to the alleged supervisory status of licensed practical nurses (LPNs) as defined in Section 2(11) of the Act. With the exception of that classification, the parties were in agreement regarding the composition of the unit.

On the last day of the hearing, the Petitioner moved to amend its petition to exclude the classification of LPNs. By so moving, the Petitioner was now seeking to represent the unit initially proposed by the Employer. The Employer would not agree to the unit as amended absent a stipulation that LPNs are statutory supervisors as defined in Section 2(11). The Petitioner would not agree to enter into such a stipulation. The Hearing Officer determined that inasmuch as the Petitioner was no longer seeking to include LPNs in the petitioned-for unit, the alleged 2(11) status of these employees was no longer an issue in this proceeding. Accordingly, she concluded that resolution of the alleged supervisory status was no longer warranted. Further, as the Petitioner was willing to proceed in the unit proposed by the Employer, the Hearing Officer closed the record as there were no other issues outstanding. At that time, she advised the parties that in the absence of any remaining issues, briefs would not be accepted. The Employer took exception to this ruling.

Initially I note that it appears from the record, that the sole issue raised at this hearing was the alleged 2(11) status of the LPNs. Substantial testimony and documentary evidence was offered with respect to this matter. After several days of hearing, the Petitioner indicated that it would withdraw the classification of LPNs from the unit description and proceed on the unit proposed by the Employer. The Employer would not agree to the bargaining unit it had proposed unless the Petitioner would stipulate that LPNs were supervisors as defined in section 2(11) of the Act. The Petitioner declined to do so and initially sought to withdraw its petition. Upon reconsideration, the Petitioner moved to amend its petition to reflect the unit offered by the Employer. The Employer again refused to stipulate to the appropriateness of the unit

it had proposed. That unit mirrored the Petitioner's petitioned-for unit with the exception of the previously contested LPNs classification. The Employer's unwillingness to join in a unit stipulation was also predicated on the absence of a stipulation that the unit referred to in the amended petition was a unit of all the Employer's non-professional employees. It appears that the genesis of this position is the absence of a resolution of the LPNs issue, i.e., if those employees are supervisors, they should be excluded, and if they are not, they should be included.

With respect to the Hearing Officer's decision to close the record, I find that this determination was proper. It is clear from the record that the parties were in full agreement with respect to the make-up of the unit with one exception, LPNs. The Employer has not argued that the failure to include or exclude any other classification impacts upon the appropriateness of the unit now sought. The parties conflicting positions are set forth above. On the last day of the hearing the Petitioner amended its petition and adopted the unit proposed by the Employer. Thus, the Petitioner decided to agree to the exclusion of LPNs from the current unit. That the Petitioner would not stipulate to the exclusion on the grounds put forth by the Employer, i.e., supervisory status, did not warrant the continuation of the hearing. To hold otherwise, would permit a party to extend indefinitely a hearing for the purpose of taking evidence on why agreed-upon classifications are being excluded when there is no dispute over their exclusion. For that matter, the extension of the Employer's argument would permit a party to litigate the reason why classifications are being included in a unit even when there is agreement on their inclusion. Extending a hearing for such a purpose is unwarranted and clearly conflicts with the statutory scheme to process representation cases in an expeditious

manner. The Petitioner agreed to proceed to an election in the unit proposed by the Employer and amended its petition accordingly. In light thereof, and in the absence of any other matter truly in dispute, the continuation of the hearing was not warranted. It is beyond peradventure that had the Petitioner never sought the inclusion of the LPNs, litigation of their status as statutory supervisors would not have been permitted. Merely because Petitioner decided to exclude LPNs from the unit midway in the proceedings is not a basis to permit the Employer to continue to litigate over an issue no longer in dispute.

With respect to the Employer's argument that it is entitled to submit a brief as a matter of right, I find that assertion without support. Section 102.67(a) of the Board's Rules and Regulations, Series 8, as amended provides in relevant part:

(a) The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine the unit appropriate for the purpose of collective bargaining, to determine whether a question concerning representation exists, and to direct an election, dismiss the petition, or make other disposition of the matter.

It is clear from this provision, that it is within the province of a regional director to determine the means by which issues raised by the parties in a representation proceeding should be addressed. The options set forth in Section 102.67(a) are in the disjunctive, not the conjunctive, and thus a director may select therefrom in deciding how to proceed. Submission of briefs is but one option. The phrase "forthwith upon the record," establishes that it is within the discretion of a regional director to render his or her decision based exclusively upon the record without post hearing submissions from the parties. In *Kingsport Press, Inc.*, 146 NLRB 1111 (1964), the employer contended that the Board, by issuing its Decision and Direction of Elections without awaiting briefs,

violated the Board's Rules and Regulations. Citing to Section 102.67(a), the Board rejected this argument stating, "...although the Board's Rules and Regulations and Statements of Procedures permit the filing of briefs, *they do not provide that the record, upon which the Board directs an election, must include briefs.*" (Emphasis supplied). Thus, the Board concluded that the submission of briefs is not a matter of right but is a privilege that the Board may, not must, extend to parties in representation case proceedings. In a more recent unpublished decision, *E.L. Gardner, a Division of Bardon, Inc.*, Case No. 5-RC-15041 (July 20, 2000) both a Board majority and a concurring opinion indicated that a regional director is not obligated to allow the filing of post hearing briefs and may issue a decision "forthwith upon the record," without such submissions. Thus, since at the close of hearing there remained no disputed issues, the Hearing Officer did not err by denying the parties the privilege to submit briefs.

2. The stipulation of the parties and the record shows that Our Lady of Consolation Geriatric Care Center, herein the Employer, a New York corporation with its principle place of business located at 111 Beach Drive, West Islip, New York, is engaged in the operation of a nursing home. During the preceding twelve months, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived gross revenues in excess of \$100,000 and purchased and received goods or services valued in excess of \$5,000 directly from entities located outside the State of New York.

Based upon the stipulation of the parties, and the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. The Petitioner in its amended petition now seeks to represent the unit set forth below. At the commencement of the hearing conducted herein, this unit was proposed by the Employer as an appropriate unit. At the time the Petitioner moved to amend its petition, the Employer would not stipulate to the appropriateness of this unit because the Petitioner would not agree to exclude LPNs because of their status as alleged 2(11) supervisors. However, at no time has the Employer contended that its proposed unit was inappropriate. Further, as noted above, the Employer has not referred to any job classification which does not appear in the unit description, and which need be addressed by the Board, in order to allow a finding that said unit is an appropriate unit. In light thereof, I find that this unit, set forth below, is appropriate for the purposes of collective bargaining:

Included: All full-time and regular part-time transport aides, companion/transporters, nutrition aides, kitchen aides, dietary aides, dietary assistants, kitchen porters, custodians, housekeepers, laundry/linen room aides, receptionist/switchboard operators, coffee shop attendants, cafeteria attendants, cook's assistants, staff development assistants, data entry clerks, receiving/storeroom clerks, clerk/typists (excluding Sisters Vigorito and Standerwick), mail room clerks, scheduling clerks, certified nursing assistants, special program nursing assistants, rehab clerk/transporters, restorative nursing assistants unit receptionists, rehab technicians, nursing service assistants, purchasing/receiving typists, admissions assistants, secretary/medical records, medical records analysts, secretary/medical services, secretary/employee health, patient accounts assistants, data processors, accounts payable clerks, maintenance workers, recreation therapy associates, second cooks, buyers<sup>1</sup>, dietetic technicians, physical therapist assistants, COTA, medical services assistants, senior accounting associates,

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<sup>1</sup> The classification "fire" appears in the unit description that was read into the record. Review of the entire record indicates that this was a typographical error and that the classification intended was "buyers."

first cooks, LTHHCP assistants, medical records assistants, biomed technicians, mechanics, biomed engineers, chefs, and engineers.

Exclude: Development/PR assistants, development/PR associates, human resources clerk/typists, safety/security officers, secretary/nursing, secretary/administration, senior store room clerks, human resources assistants, senior cafeteria attendants, dieticians (non ADA), social work assistants, payroll specialists, senior human resources assistants, rehab services coordinators, admissions coordinators, senior laundry/linen room aides, maintenance supervisors, housekeeping supervisors, recreational therapists, administrative assistants, patient accounts manager, human resources manager, first cook/supervisor, dietary supervisor, dietary supervisor/Q.A., pastoral care assistants, pastoral care associates, licensed practical nurses, employee health service nurses, employee health service supervisor, infection control nurse/LPN, dieticians, LPN charge nurses, social workers, registered nurses, physical therapists, occupational therapist, physical therapists (per diem), occupational therapists (per diem), physical therapy supervisor, occupational therapy supervisor, MDS nurses, head nurse/RN, staff educator, employment coordinator, supervisor/community health nurse, resident care manager, community health care nurse manager, patient care manager, nursing care coordinator, certified restorative nurse manager, case manager, geriatric nurse practitioners, RN/special care manager, infection control coordinator, chaplain, controller, assistant director/staff development, director of engineering, director of patient services, senior vice president/COO, director of food services, acting director of nursing services, president and CEO, assistant director of food services, senior vice president/CFO, vice president patient/resident advocacy, vice president/human resources, director of materials management, director of recreational therapy, director of rehabilitative services, assistant director of housekeeping, assistant director of recreational therapy, director of public relations/development, assistant director/performance improvement, director of human resources, director of security, medical director, assistant director of nutritional services, director of housekeeping, assistant director of medicine, vice president mission and ministry, assistant director of social services and vice president of performance improvement.

### **DIRECTION OF ELECTION**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether they desire to be represented for collective bargaining purposes by New York's Health and Human Services Union, 1199/SEIU, AFL-CIO.

### **LIST OF VOTERS**

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon*

*Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before May 3, 2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

### **NOTICES OF ELECTION**

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the nonposting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a

request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by May 10, 2001.

Dated at Brooklyn, New York, April 26, 2001.

/S/ Alvin Blyer

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Alvin Blyer  
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